APPENDIX A

Opinions of United States Court of Appeals, Tenth Circuit, in Rogers v. Westhoma Oil Company, 291 F.2d 726 (1961), and on Rehearing Thereon, 291 F.2d 732.

J. P. ROGERS, Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee (two cases).

A. L. HILBIG, Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee.

Frank G. BOLES and Katie M. Boles, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee (seven cases).

Blanche ENGEL, Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee (two cases).

Robert W. BAUGHMAN and Helen E. Baughman, his wife, Robert W. Baughman, Oliver S. Brown and Guy E. Spear, Executors and Trustees of the estate of John W.

Goldie B. DUBOIS,
Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Alice Marjorie McGILL and Sherley McGill, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Paul R. PACKER,
Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Etta HAWK, Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Orville BELILE and Helena L. Belile, Appellants,
vs.
WESTHOMA OIL COM-

Baughman, deceased,
Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

A. L. HILBIG and Esther Mae Hilbig, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Lula DUNLAP, H. Harold Dunlap, Pearl Pitcher, Robert L. Dunlap, Josephine Light, Marilyn E. Dunlap, Catherine C. Dunlap and Charles M. Light, Jr.,
Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee (two cases).

Robert W. BAUGHMAN, Oliver Brown, and Guy E. Spear, Executors of the estate of Ella Baughman, deceased, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

PANY, a corporation,
Appellee.

N. G. MORLAN and Okel E. Morlan, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

E. D. HAMPTON and Flora Hampton, Appellants.
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Merle W. BLOOM, Mildred L. Bloom, Nellie J. Vail, L. A. Bloom, Mildred C. Bloom, Edna E. Headrick, Roy W. Headrick, Wilma A. Keating and James B. Keating,
Appellants,
vs.
WESTHOMA OIL COMPANY, a Corporation, Appellee (two cases).

Joseph A. HANLIN, Francis B. Hanlin, Mary J. Brewington and Ray Brewington, Appellants,

vs.

WESTHOMA OIL COMPANY, a corporation, Appellee.

Nos. 6522-6548.

United States Court of Appeals
Tenth Circuit.

May 4, 1961.

Rehearing Denied July 11, 1961.

Dale M. Stucky and Wayne Coulson, Wichita, Kan. (Auburn Light, James R. Yoxall, Liberal, Kan., Paul R. Kitch, Donald R. Newkirk, Robert J. Hill, Gerrit H. Wormhoudt and Robert T. Cornwell, Wichita, Kan., and Light & Light, Liberal, Kan., Hugo T. Wedell and Homer V. Gooing, Wichita, Kan., of counsel, on the brief), for appellants.

John F. Eberhardt, Wichita, Kan. (George B. Powers, Carl T. Smith, Stuart R. Carter, Robert C. Foulston, Malcolm Miller, Robert N. Partridge, Robert M. Siefkin, Richard C. Harris and Gerald Sawatzky, Wichita, Kan., on the brief), for appellee.

Elmer W. Adams, Tulsa, Okl., Lynn Adams, Oklahoma City, Okl., G. D. Ashabranner, George H. Bowen, Cecil R. Buckles, Angus A. Davidson, Glenn R. Davis, J. Paul Greve, Howard H. Harris, Tulsa, Okl., Coleman Hayes, S. D. Holloway, Oklahoma City, Okl., Robert A. Huffman, Hawley C. Kerr, Tulsa, Okl., Gentry Lee, Bartlesville, Okl., William E. Lester, Tulsa, Okl., Richard R. Linn, Oklahoma City, Okl., James H. McGowan, Tulsa, Okl., R. O. Mason, L. G. Minter, Bartlesville, Okl., Robert W. Richards, Ok-

lahoma City, Okl., Richard P. Ryan, Tulsa, Okl., Nathan Scarritt, Enid, Okl., Norton Standeven, Oklahoma City, Okl., Leslie A. Thompson, H. B. Watson, Jr., Philip R. Wimbish, Tulsa, Okl., John W. Wolfe, Oklahoma City, Okl., and Wm. J. Zeman, Bartlesville, Okl., amici curiae.

Before MURRAH, Chief Judge, and BRATTON and BREITENSTEIN, Circuit Judges.

These 27 consolidated appeals are from separate judgments entered in declaratory judgment actions brought by lessors or their successors to determine whether the oil and gas leases involved had terminated as to all horizons below sea level at the expiration of their respective primary terms because of failure to obtain production. They present a common question of law bearing on similar and undisputed facts. Twenty-four of the actions were removed from Kansas state courts and three were filed originally in federal court. There is unquestioned diversity jurisdiction. The parties, agreeing that there were no factual issues, each moved for summary judgment and the lower court held that the leases had all been continued beyond their primary terms by gas production secured within those terms from horizons above sea level. The lessors have appealed.

The 27 leases cover land in the Hugoton Field, Seward County, Kansas, and were identical in form, differing only as to date, lessor or lessors, and land descriptions. Twenty-four were executed during 1941 and 1942 and three in 1944. Each was for a 10-year primary term. By mesne assignments, Plains Natural Gas Company (Plains) became the owner of the leases as to all horizons above sea level and appellee-defendant Westhoma Oil Company (Westhoma) became the owner of the leases as to all horizons below sea level. No question is raised as to the

validity of these assignments on the basis of horizontal divisions.

The Kansas Corporation Commission by proration order established 640 acres as the basis for computing allowables in the Hugoton Field.[1] In an appropriate manner, Plains acted to consolidate its holdings into 640-acre units. The statement accomplishing this purpose provided that:

> "[A] 11 producing horizons which are situated above and down to, but not below, the sea level, shall be deemed, treated and operated as a consolidated gas leasehold estate."

Within the primary term of each lease Plains secured commercial gas production from above-sea-level horizons on each of the consolidated units. As to 9 of the leases the producing well is on the leased land and as to 18 the well is located elsewhere on the unit involved. No production of oil or gas was obtained during the primary term from below-sea-level horizons.

Each lease contained a "thereafter" clause which will be discussed later. Ordinarily an oil and gas lease is extended beyond the primary term by a "thereafter" clause if a producing well is obtained at any location on the leased premises during the primary term.[2] None of the parties question the general rule that production from any part of a consolidated or pooled unit perpetuates all leases within the unit, even as to ununitized acreage, unless the leases

1. The Commission order is not set out in full in the record but it apparently affected only gas production from above-sea-level horizons. It is so treated by the parties.

2. *Cowman* v. *Phillips Petroleum Co.*, 142 Kan. 762, 51 P.2d 988, 991.

provide to the contrary.[3] Each lease in question also contains what is called a "Pugh clause"[4] which is designed to prohibit lease continuation beyond the primary term as to nonproducing areas not included within a productive unit.

The habendum clauses of the leases provide a term of 10 years and as long thereafter as oil or gas is produced from the premises "and as long as hereinafter otherwise provided in the event of consolidation."[5] The parties agree that the occurrence of production on or off the leased premises included within a unit makes no difference in the disposition of the controversy and that the "hereinafter otherwise provided" clause controls because there was consolidation. In these circumstances, this court is not concerned with what the situation might be in the absence of such an agreement.

The Kansas Supreme Court has established rules which govern the construction and application of oil and gas leases in that state. In *Tate* v. *Stanolind Oil & Gas Co.*, 172 Kan. 351, 240 P.2d 465, 468-469, it is said that the intent of the parties is the primary question; that reasonable rather than unreasonable interpretations are favored; that

---

3. *Whitaker* v. *Texaco, Inc.*, 10 Cir., 283 F.2d 169; *Panhandle Eastern Pipe Line Company* v. *Isaacson*, 10 Cir., 255 F.2d 669; *McCammon* v. *Texas Company*, D.C. Kan., 137 F. Supp. 256; 2 Summers, Oil & Gas, Perm. Ed., § 302.1, pp. 293-294 and cases cited in note 98.15.

4. Cf. *Broussard* v. *Phillips Petroleum Company*, D.C. La., 160 F. Supp. 905, 907, affirmed *per curiam* on basis of opinion below, 5 Cir., 265 F.2d 221.

5. In each lease the habendum clause reads thus: "This lease shall remain in force and effect for a term of ten (10) years from the date of its delivery (hereinafter sometimes called the 'primary term') and as long thereafter as oil, gas, or other minerals are or can be produced from any well on said premises and as long as hereinafter otherwise provided in the event of consolidation."

meaning should be ascertained by consideration of all pertinent provisions rather than "by a critical analysis of a single or isolated provision"; that in the event of ambiguity or uncertainty consideration must be given to "the instrument as a whole, the object sought to be obtained, and other circumstances, if any, which tend to clarify the real purpose and intent of the parties"; and that a practical and equitable construction must be given to ambiguous terms. We must decide the cases on the basis of the instruments before us and the Kansas law.

The trial court held that the Pugh clauses were written in "surface sounding terms" and do not "specifically or clearly designate underground horizons" and concluded that the provisions of the Pugh clauses terminating the leases at the end of the primary terms as to ununitized nonproducing portions apply only to "partial unitization of less than all of the surface acreage covered by the leases." As all the surface acreage was unitized, and as there was production from each unit, the decision was that the leases were continued beyond the primary terms as to all horizons.

Admittedly, the Pugh clauses apply to vertical divisions of the leased premises. The query is whether they apply to horizontal divisions. In determining the issue we are aided by no decisions which are directly in point. *Broussard* v. *Phillips Petroleum Company*, *supra*, and *Humble Oil & Refining Co.* v. *Hutchins*, 217 Miss. 636, 64 So.2d 733; 65 So.2d 824, relied on by lessors, are not helpful as each concerned the application of a Pugh clause to a vertical rather than a horizontal division. Westhoma relies on *Martin* v. *Texas Gulf Producing Co.*, 223 Miss. 872, 79 So.2d 270, involving a lease which did not contain a Pugh clause. The court there rejected the contention that failure to drill below a horizon which had been

unitized and from which production had been obtained off the leased premises but within the unit terminated the lease. *White* v. *Frank B. Treat & Son*, 230 La. 1017, 89 So.2d 883, also cited by Westhoma, was concerned with a mineral servitude rather than a lease and held that production from a unitized zone continued the servitude as to all zones. No Kansas decisions bearing on the specific point have been brought to our attention.

Under the Pugh clauses the lessee is authorized to consolidate the leasehold estate, "or any part or parts thereof," with the mineral leasehold estate, "or parts thereof", in other lands upon which the lessee at the time has a valid lease. The consolidation is limited to include not more than 2,560 acres. The lengthy and technical arguments as to whether the word "part" is confined to vertical divisions on the basis of surface acreage or also encompasses horizontal divisions on the basis of depth can be simply resolved. The ordinary practice is to confine consolidations to a formation or pool which constitutes a known common source of supply.[6] In situations where there is more than one source or pool underlying the same land[7] a comprehensive consolidation from the surface to the center of the earth carries with it the potential of grievous complications if different geographical units are established for different producing formations.[8] The leases

---

6. Hoffman, Pooling and Unitization Clauses in Oil Leases, 1 Rocky Mountain Mineral Law Institute, pp. 107-108; Summers, supra, Vol. 3, § 553.1; cf. *Carter Oil Co.* v. *McCasland*, 10 Cir., 190 F.2d 887. See 1959 Supp. to G.S. Kan. 1949, §§ 55-603 and 55-703 which respectively empower the state corporation commission to regulate the taking of oil from any pool and of gas from any common source of supply.

7. Cf. *Whitaker* v. *Texaco, Inc.*, *supra*, 283 F.2d at pages 176-177.

8. *Hoffman*, *supra*.

contain no prohibition against the recognized practice of consolidating in terms of sources of supply, pools, or depth. The parties recognize the validity of the partial assignments to Plains and Westhoma with division on the basis of depth. Plains could not consolidate the entire leasehold estate as it did not own that portion below sea level. In the situations presented it is our opinion that "part" as used in the consolidation authorization includes both horizontal and vertical divisions.

The Pugh clause lease continuation provisions are found in subparagraph 9 (a) which reads that in the event of consolidation the lease shall be continued "as to the premises covered hereby and included in any such consolidation of estates" by a producing gas well located on a consolidated unit or by oil production from a well on leased land.

Lease termination is covered by sub-paragraph 9(b) of the Pugh clause which states that the lease terminates at the expiration of the primary term as to any "tract or tracts not included in a consolidation held in force by production" unless there is production in accordance with other lease terms.

Consistency between 9(a) and 9(b) requires that "premises" as appearing in 9(a) and "tract or tracts" as appearing in 9(b) be given the same meaning. We deem it unnecessary to engage in a semantic analysis of the technical implications of the quoted terms. Definitions can be found which confine those terms to surface application and other definitions give them such generality of meaning as to include both surface and sub-surface rights. It is enough that consolidation may be on the basis of horizontal as well as vertical divisions and the consolidation here made includes only that portion of the leasehold estate which is above sea level. The portion below sea level was

not consolidated and hence is not within the purview of 9(a) and the continuation provisions of that subparagraph do not apply. By the same reasoning the termination provisions of 9(b) are applicable and term .e the leases as to the below-sea-level horizons at the e . of the primary term because there was no production therefrom during that term.

To avoid this conclusion Westhoma argues that the lease provisions for delay rentals and minimum gas royalties are stated in terms of surface acres, that the lease must be considered in its entirety, and that the inapplicability of the delay rental and minimum gas royalty provisions to horizontal divisions requires the conclusion that consolidations must likewise be treated solely from the standpoint of surface acres. As we are not concerned with delay rentals or royalties, the provisions in regard thereto are pertinent only so far as they bear on intent and for such purpose we find them without persuasive effect. Delay rentals are specifically mentioned in 9(b) and, as has been shown, that subparagraph ends the leases at the expiration of the primary term as to unconsolidated unproductive tracts. Provision for rental on an acreage basis does not mean that the parties intended lease continuation for that part of the leasehold estate which was without a consolidation and which was unproductive.

Problems relating to minimum royalties payable on an acreage basis obviously can cause complications in the event there is production from more than one horizon but those complications will occur regardless of whether the lease is divided on a horizontal basis. Granting that in hypothetical situations difficulty might arise over the rent and royalty provisions, the fact remains that bothersome lease provisions of uncertain meaning and application are

of little help in determining the meaning of other lease provisions.

Westhoma emphasizes the indivisibility of the express and implied covenants of a single oil and gas lease.[9] The liabilities of lessee and his assignee are not altered by any division which the lessee may make of his interests,[10] but that rule has no effect here. The separation of the lease into two parts with the lease continuing as to the upper horizons and terminating as to the lower horizons results from the application of lease terms. There is nothing to prevent parties from agreeing that a lease may be separated under certain conditions. The argument that the conclusion reached imposes additional requirements to keep the lease alive is unimpressive. Under the Pugh clauses if there were vertical consolidations of less than all lease acreage, there would be the additional requirement of drilling and obtaining a producing well on the unconsolidated area. The fact that the result also ensues from a horizontal consolidation does not make the Pugh clauses any less effective when there is a horizontal rather than a vertical consolidation. The same requirements apply to each.

We must arrive at the intent of the parties. The Pugh clauses are for the protection of the lessors to prevent lease continuation as to ununitized portions which are nonproducing. We find nothing in the leases which confines the application of the Pugh clauses to surface areas and vertical divisions. It is common knowledge that leases are divided both vertically and horizontally and that unitization is ordinarily on the basis of a common source of supply.

---

9. Cf. *Wilson* v. *Texas Company*, 147 Kan. 449, 76 P.2d 779, 783.

10. *Summers, supra*, Vol. 3, § 512, p. 403.

While the inclusion of all surface areas in consolidations protects lessors from the hardships resulting, in the absence of a Pugh clause, from partial vertical consolidation, recognition of this fact does not solve the problem. A lease can provide for protection against continuation both of unconsolidated vertical divisions and of unconsolidated horizontal divisions. Considering these leases as a whole, we believe that a reasonable interpretation requires the conclusion that it was the intent of the parties to prohibit lease continuation as to unproductive portions without a consolidation whether such portions were the result of horizontal or vertical divisions. As the below-sea-level horizons were not included within any consolidations and as there was no production therefrom, the leases terminated as to such horizons at the end of the primary period.

In Nos. 6522 to 6548, inclusive, the judgments are severally reversed with directions to enter judgments for the plaintiffs cancelling the leases so far as below-sea-level horizons are concerned.

BRATTON, Circuit Judge (dissenting).

Section 2 in each of the several leases provides in conventional form that the lease shall remain in force and effect for a term of ten years from the date of its delivery and as long thereafter as oil, gas, or other minerals are or can be produced from any well "on said premises and as long as hereinafter provided in the event of consolidation." Section 9 expressly authorizes consolidation of the leasehold estate "or any part or parts thereof" with other leaseholds owned by the lessee. And it further provides in effect that after consolidation, the lease shall continue in force and effect so long as gas is or can be produced from any well "located on any part of the land included in such consolidation (whether on

lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby." In short, each lease provides that it shall be continued beyond the primary period by production as therein specified during such primary period.

But the leases do not speak of horizons. They make no reference in specific language to production from one horizon perpetuating or failing to perpetuate the leases in respect to another horizon. They are silent in respect to partial unitization or consolidation of horizontal structures. They say nothing concerning depths, levels or stratums. They are completely silent as to such terminology. Viewed as a whole, and given a reasonable interpretation, the leases fail to indicate persuasively that at the time of their execution, the parties lessor and lessee were thinking in terms of sub-surface separation or segregation of mineral rights by levels, horizons or stratums, in respect to production from one level or horizon failing to continue the leases beyond the primary period in respect to another level or horizon. Instead, they say in general language that production during the period shall continue their existence in force and effect beyond the termination of the primary period. They do refer to consolidation of any part or parts of the leasehold premises. But that reference is to surface separation or division by vertical segregation. It does not refer to sub-surface segregation by depth, level, stratum, or horizon. And in the absence of an express provision in the leases relating to production from one level or horizon during the primary period failing to perpetuate the leases in respect to another level or horizon, production during the primary period from a horizon above sea level had the effect of perpetuating beyond the primary period the leases in their entirety. Cf. *Martin* v.

Texas Gulf Producing Co., 223 Miss. 872, 79 So.2d 270; *White* v. *Frank B. Treat & Son*, 230 La. 1017, 89 So.2d 883.

It is my view that the judgments should be severally affirmed.

On Petition for Rehearing.

BREITENSTEIN, Circuit Judge.

With the court's permission, 28 lawyers have joined in an *amici curiae* brief supporting the appellee's petition for rehearing. Among other things, they attack the holding that the Pugh clauses were for the protection of the lessors. They point out that all of the leases in question were executed during World War II and say that the Pugh clauses were to permit the consolidation necessary to accommodate the leases to an order of the Office of Production Management limiting the availability of certain materials to gas wells drilled on a pattern of 1 to 640 acres.[1] The point is not well taken because 7 of the leases were executed before December 23, 1941, the date of that order. The parties tried the cases and presented the appeals on the basis that there were no facts distinguishing any one lease from the others. The mentioned order could not have influenced the drafting of leases issued prior thereto.

The opinion of the court is said to be a departure from the prudent-operator rule. No such departure was either intended or made. The prudent-operator rule imposes on a lessee the implied duty to do whatever in the circumstances would be reasonably expected of a prudent operator of a particular lease, having rightful regard for the interest of both the lessor and the lessee.[2] Ordinarily, the

1. Conservation Order M-68, 6 Fed. Reg. 6687.

2. *Sun Oil Company* v. *Frantz*, 10 Cir., 291 F.2d 52.

prudent-operator rule comes into play in connection with a claim of breach of the implied covenant for further development. We have no such situation here as these consolidated cases involve the question of lease termination at the expiration of the primary term. They do not involve any claimed breach of the implied covenant for further development. Counsel for Westhoma have explicitly recognized in their briefs the rule laid down in *Panhandle Eastern Pipe Line Company* v. *Isaacson*, 10 Cir., 255 F.2d 669, and *Whitaker* v. *Texaco, Inc.*, 10 Cir., 283 F.2d 169, that production from a unit which contains a part of the leasehold estate continues the entire lease beyond the primary term in the absence of countervailing lease provisions. They concede that the Pugh clauses have the effect of abrogating this rule so far as vertical divisions are concerned but they say that this result does not follow as to horizontal divisions. The holding of the court applies the Pugh clauses to both vertical and horizontal divisions and gives those clauses the effect of abrogating the Whitaker and Panhandle rule as to the entire leasehold estate.

In the case at bar if there had been no consolidation, production of oil or gas from above-sea-level horizons would have continued the lease or leases in connection with which such production was obtained as to all horizons within the vertical boundaries but the lessee would be under the obligation of the implied covenant of further development.[3] The parties agree that the continuation of

---

3. In saying this we are neither overlooking nor determining the effect of lease paragraph 16 which reads: "Lessee shall be under no obligation, express or implied, to drill more than one well upon the consolidated leasehold for the production of gas, regardless of when, where, or by whom offset wells may be drilled, provided nothing herein shall prevent lessee from drilling as many wells as it may desire." This has no application to oil production or to unconsolidated portions such as the below-sea-level horizons.

the leases beyond the primary term is controlled by the Pugh clauses. By their terms these clauses operate to continue the leases beyond the primary term by gas production only as to the parts thereof within a consolidation. Diverse ownership made the consolidation of the below-sea-level horizons with above-sea-level horizons impossible.

Counsel for Westhoma insist that the opinion of the court places an unreasonable interpretation on the leases because no rational purpose can be accomplished by applying the Pugh clauses to ununitized horizontal divisions. We disagree. An important purpose of the Pugh clauses when considered in connection with vertical divisions is to prevent lease continuation beyond the primary term as to unproductive areas not included within a unit and to obviate the necessity of an action for breach of the implied covenant to develop further in order to terminate the lease as to such areas.[4] Exactly the same reason applies so far as horizontal divisions are concerned.

The amici object to the application of subsurface meaning to the word "part" and analyze the use of that word in the leases. In so doing they fail to mention paragraph 10 providing for lease assignment "in whole or in part" and disregard the fact that the parties admit the validity of the partial assignments to Plains and Westhoma on the basis of horizontal divisions.

The petition for rehearing is denied.

BRATTON, Circuit Judge, would grant the petition for rehearing and affirm the judgment.

---

4. In *Whitaker* and *Sun Oil*, both *supra*, it was pointed out that lease continuation beyond the primary term resulting from production on a unit containing part of the leased premises was subject to compliance with the implied covenant to further develop. The Sun Oil case was an action to forfeit for breach of that covenant.

APPENDIX B

Letter Order of the United States District Court for the Western District of Oklahoma Denying Stay and Consolidating Cases

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Chambers of
Stephen S. Chandler
Chief Judge

Oklahoma City 1
October 18, 1961

Fleeson, Gooing, Coulson & Kitch
901 First National Bank Building
Wichita 2, Kansas
Hemry & Hemry
1355 First National Building
Oklahoma City 2, Oklahoma
Light & Yoxall
Liberal, Kansas
Cochran, Dudley, Fowler, Rucks, Baker & Jopling
1133 First National Building
Oklahoma City, Oklahoma.

Re: 9409-9415-Civil, 9419-Civil, 9421-Civil, 9431-Civil, 9435-Civil Eva J. Baxter et al v. Westhoma Oil Company et al

Gentlemen:

Upon consideration of defendants' motions to stay, I have come to the conclusion that the motions should be, and they hereby are overruled and defendants are granted 10 days in which to answer.

The cases filed by defendants in the District Court of Texas County, Oklahoma, were instituted subsequent to the suits in this court, and it is impossible to ascertain how long it will be before a final decision will be rendered in those cases in state court. As a general rule, it takes much longer for a case to be finally decided in the state courts of this state than it does for a case to reach final decision in the federal courts sitting here. Furthermore, the defendants could have filed their suits in the courts of the State of Oklahoma any time after the cases were filed in Kansas which resulted in the decision of Rogers v. Westhoma, 291 F.2d 726, but they did not choose to do so until the instant suits were filed. Although the defendants insist that the question herein involved should be decided by a state court, the defendant Westhoma itself removed the Kansas cases to federal court from state court. Under the circumstances, it would not be fair or right for this court to stay these actions pending the outcome of the state court suits and thus enable the defendants to choose the forum when their apparent purpose, in view of Westhoma's choice of a federal forum in Kansas, is to speculate on a different decision from another court of concurrent jurisdiction. This is true particularly where the remedy in this court undoubtedly will result in a final determination in a fraction of the time necessary to obtain one in the state forum.

It is further ordered that the above captioned cases be consolidated for purposes of discovery, pre-trial and trial.

Very truly yours,

s/ Stephen S. Chandler
Stephen S. Chandler

P. S. Subsequent to the filing of the cases above mentioned, three new companies cases have been filed—J. J. French et al. v. Westhoma Oil Company et al., No. 9446-Civil, Riffe Wesley et al. v. Westhoma Oil Company et al., No. 9448-Civil, and Ostby S. Austin et al. v. Westhoma Oil Company et al., No. 9458-Civil—and they are hereby consolidated for purposes of discovery, pre-trial and trial with those cases discussed in the main body of this letter. The defendants' motions to stay in cases numbered 9446-Civil and 9448-Civil are also overruled for the reasons set forth above.

S. C.

APPENDIX C

Complaint Filed by Respondents Otto G. Lutes and Florence Lutes

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

OTTO G. LUTES and FLORENCE LUTES,
Plaintiff(s),

vs.

WESTHOMA OIL COMPANY, a Corporation, PEERLESS OIL & GAS COMPANY, a Corporation, and JAKE L. HAMON,
Defendants.

No. 9410

COMPLAINT.

Come now plaintiff(s) and for cause of action against defendants, and each of them, allege that:

1. Plaintiff(s) (are) resident(s) and citizen(s) of the State of Oklahoma.

2. Defendants Westhoma Oil Company and Peerless Oil & Gas Company are corporations organized and existing under and by virtue of the laws of the State of Delaware and are authorized to do business and are doing business in the State of Oklahoma. The principal place of business of each of said defendants is located in Denver, Colorado. The registered service agent in Oklahoma for each of said defendants is A. H. Mahnker, 735 First National Building, Oklahoma City, Oklahoma.

3. Defendant Jack L. Hamon is a citizen of the State of Texas. Said defendant maintains his residence and usual place of abode at 4738 Shadywood Lane, Dallas, Texas, and an office in the Vaughn Building, Dallas, Texas. Said defendant cannot be served with summons in the State of Oklahoma.

4. The amount in controversy, exclusive of interest and costs, is in excess of $10,000.00.

5. Plaintiff(s) (are) the owner(s) in fee and in possession of all the oil, gas and other minerals in, under and that may be produced from the following described land situated in Texas County, Oklahoma, to-wit:

> Southeast Quarter (SE/4) of Section Twenty-seven (27), Township six (6) North, Range Eighteen (18) ECM.

Such interest of the plaintiff(s) is subject to any valid and subsisting oil and gas lease or leases thereon. Plaintiff(s) is (are) in possession and charge of such property.

6. On or about the 15th day of February, 1943, plaintiffs as lessor(s), executed, to Peerless Oil and Gas Company, as lessee, an oil and gas mining lease, dated the 8th day of January, 1943, covering the lands above described. The lease was delivered to the lessee on or about the date it was executed. A true copy of such lease, which is re-

corded in the office of the County Clerk of said county in Book 233 at page 275, is marked "Exhibit A" and is attached hereto and made a part hereof.

7. Said lease provided among other things that it should remain in force for a term of ten (10) years from the date of its delivery and as long thereafter as oil, gas or other minerals are or can be produced from any well on said premises and "as long as hereinafter *otherwise* provided in the event of consolidation".

8. The lease further provided in Article 9 thereof:

"9. Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts thereof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall be consummated when the owner of the leasehold estate created hereby shall have executed and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby

or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained, from this or the consolidated leasehold, the lessee shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid, but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

9. By virtue of mesne assignments thereof, the lease mentioned came to be owned, and is now owned, by Hugoton Plains Gas & Oil Company *as to producing horizons above sea level only*, and by the defendant Westhoma Oil Company, so far as it affects the land hereinabove described, is marked "Exhibit B" and is attached hereto and made a part hereof.

10. On the 12th day of December, 1949, the then owner or owners of the lease as to the producing horizons above sea level and other leases as to such horizons, caused to be filed in accordance with Article 9 of the lease a notice of unitization and consolidation and thereby created a consolidated gas leasehold estate consisting of gas leasehold estates in the following described lands in Texas County, Oklahoma:

All of Section Twenty-seven (27), Township Six (6) North Range Eighteen (18) ECM,

as to producing horizons above sea level only. A true copy of the notices of unitization and consolidation is marked "Exhibit C" and is attached hereto and made a part hereof.

11. By reason of the foregoing, the owners of the lease hereinbefore described have in legal effect divided that lease horizontally into two leases, one as to producing horizons above sea level only, and one as to producing horizons below sea level only.

12. The primary term of the basic lease has expired. It has been continued in force as to horizons above sea level and above sea level only by production of gas from such horizons, which production still continues.

13. There has been no production of oil from the leased land nor any production of gas from any horizon below sea level in the land described in the basic lease or from any such horizon in other land in a consolidated estate which may include horizons below sea level in the land or any part thereof described in the basic lease, and at the time of expiration of the primary term no operation was in progress for the drilling of an oil well on the leased land into any formation or for drilling into any formation below sea level for the production of gas therefrom. Therefore, and by reason of all the facts hereinbefore alleged, the lease as to all horizons below sea level has expired by its terms.

14. Defendants, and each of them, appear to have or claim some interest in the lease aforesaid as to horizons below sea level in the land described in the lease and such constitute a cloud upon the title to the above described property. Plaintiff(s) do not know the nature of such claim or interest; and defendants should be required to plead in this action and submit their claim of interest for adjudication of its validity or invalidity.

WHEREFORE, the plaintiff(s) pray that the oil and gas lease hereinbefore described be held to have expired by its terms as to all horizons below sea level in the land

described therein; that the lease as to all such horizons be cancelled and that the title of the plaintiff(s) to such horizons be quieted as against the defendants herein; and further pray for all other and proper relief.

Light & Yoxall
Liberal, Kansas

Fleeson, Gooing, Coulson & Kitch
901 First National Bank Building
Wichita, Kansas

Hemry & Hemry
1355 First National Building
Oklahoma City, Oklahoma

By /s/ Robert T. Cornwell
Attorneys for Plaintiffs

(EXHIBIT A ATTACHED TO COMPLAINT)

Oil and Gas Mining Lease

THIS AGREEMENT entered into this 8th day of January, 1943, by and between Otto George Lutes, and wife Florence Lutes, the undersigned, hereinafter called Lessor, whether one or more, and Peerless Oil and Gas Company, the undersigned, hereinafter called Lessee,

WITNESSETH:

1. That lessor for and in consideration of the sum of One and No/100 Dollars ($1.00), in hand paid, and of the covenants and agreements hereinafter contained, to be performed by lessee, have this day granted and leased, and hereby grant and lease and let unto the lessee for the purpose of mining and operating for, and producing oil, gas and casinghead gas and gasoline from the hereinafter described premises, laying pipe lines, building tanks, storing oil, building power stations, rigs, derricks, slush

pits, operating boilers, engines, stations, telephone lines and other structures and appliances to produce, transport, save, take care of and manufacture any and/or all such substances and for housing and boarding employees, the following described property situated in the State of Oklahoma, County of Texas, to-wit:

> The West half of the Southwest Quarter of Section Twenty-six (26) and the Southeast Quarter of Section Twenty-seven (27) and the East half of the Southwest Quarter of Section Twenty-seven (27) all in Township Six (6) North of Range Eighteen (18) ECM

containing 320 acres, more or less.

2. This lease shall remain in force and effect for a term of ten (10) years from the date of its delivery (hereinafter sometimes called the "primary term") and as long thereafter as oil, gas, or other minerals are or can be produced from any well on said premises and as long as hereinafter otherwise provided in the event of consolidation. * * *

9. Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts threof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall be consummated when the owner of the leasehold estate created hereby shall have executed

and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect and for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained, from this or the consolidated leasehold, the lessee shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid, but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

* * *

10. If the estate of either party hereto is assigned (and the privilege of assigning in whole or in part, as to any part of said land, or as to only oil or only gas, is expressly allowed), the covenants hereof shall extend to the heirs, executors, administrators, successors and assigns, but no change of ownership in the land or in the rentals or royalties shall be binding on the lessee until after notice

to the lessee and it has been furnished with the written transfer or assignment of a certified copy thereof. * * *

IN WITNESS WHEREOF, We sign the day and year first above written.

/s/ Otto G. Lutes
/s/ Florence Lutes

(EXHIBIT B ATTACHED TO COMPLAINT)

Assignment of Oil and Gas Leases

KNOW ALL MEN BY THESE PRESENTS: That Vernon Taylor, Jr., of Bexar County, Texas, Ruth Taylor Campbell, of Montgomery County, Alabama, The Sara H. Taylor Trust (Vernon F. Taylor Trustee thereof) and The James C. Taylor Trust (Vernon F. Taylor Trustee thereof) hereinafter called assignors, in consideration of Ten ($10.00) Dollars and other good and valuable consideration to them passing, the receipt of which is hereby acknowledged, do hereby transfer, assign and convey unto Westhoma Oil Company, a corporation, duly incorporated and existing under the laws of the State of Delaware and having authority to do business both in the State of Oklahoma and in the State of Kansas, hereinafter called assignee, all of the assignors' right, title and interest in and to the oil and gas leases insofar as they cover the hereinafter described lands to the extent of the producing horizons which are situated *below, and only below*, sea level. Said leases are described below by reference to the dates thereof, name of lessors, name of lessees, county and state in which the property is located, description of the land, and the book and page of the recording thereof, respectively, as follows, to-wit:

REVENUE STAMPS ...0 affixed.

TEXAS COUNTY, OKLAHOMA

Date:	January 8, 1943
Lessor:	Otto G. Lutes and Florence Lutes
Lessee:	Peerless Oil and Gas Company
Description:	The West half of the Southwest Quarter of Section Twenty-six (26) and the Southeast Quarter of Section Twenty-seven (27) and the East half of the Southwest Quarter of Section Twenty-seven (27) all in Township Six (6) North of Range Eighteen (18) ECM
Recorded:	Book 233 at Page 274
Expiration:	January 8, 1953
Acreage:	320 acres
	(Together with other leases)

and being leasehold interests heretofore transferred and assigned to the assignors by Peerless Oil & Gas Company.

This transfer and assignment, however, is pursuant to the terms and provisions as set forth in a written agreement between Peerless Oil & Gas Company and these assignors dated September 20, 1944.

To have and to hold the same unto the said assignee, its successors and assigns, according to the terms and conditions of said leases.

The effective date of this instrument is January 1, 1948, at seven o'clock A.M.

Witness the hands of the assignors, this 15th day of December, 1947.

/s/ Vernon Taylor, Jr.
Vernon Taylor, Jr.

/s/ Ruth Taylor Campbell
Ruth Taylor Campbell

/s/ Vernon F. Taylor
Vernon F. Taylor, As Trustee
for the Sara H. Taylor Trust

/s/ Vernon F. Taylor
Vernon F. Taylor, As Trustee
for The James C. Taylor Trust

(EXHIBIT C OF COMPLAINT)

Declaration of Consolidation of Oil and Gas Leases

KNOW ALL MEN BY THESE PRESENTS:

THAT Plains Natural Gas Company, a Corporation, is the owner of the following described valid and subsisting oil and gas leases:

1. From Otto G. Lutes, also known as Otto George Lutes, and wife, Florence Lutes, Lessors, to Peerless Oil and Gas Company, Lessee, dated January 8, 1943, recorded in Book 233, Page 275, of the Records of Texas County, Oklahoma, covering, among other lands, the following described land in Texas County, Oklahoma:

> The Southeast Quarter (SE/4) of Section Twenty-seven (27) and the East Half of the Southwest Quarter (E/2 SW/4) of Section Twenty-seven (27), all in Township Six (6) North, Range Eighteen (18) ECM, Texas County, Oklahoma, containing 240 acres, more or less;

2. From Louis B. Carpenter and wife, Mary E. Carpenter, Lessors, to Peerless Oil and Gas Company, Lessee, dated January 7, 1943, recorded in Book 233, Page 322, of the Records of Texas County, Oklahoma, covering, among other lands, the following described land in Texas County, Oklahoma:

> The West Half (W/2) of the Southwest quarter (SW/4) of Section Twenty-seven (27), Township Six (6) North, Range Eighteen (18) ECM, Texas County, Oklahoma, containing 80 acres, more or less;

3. From Isaac H. Lutes and Mary A. Lutes, his wife, Lessors, to Frank Parkes, Lessee, dated January 7, 1937, recorded in Book 207, Page 365 of the Records of Texas County, Oklahoma, as extended by instrument dated December 22, 1942, executed by Isaac H. Lutes, recorded in Book 236, Page 55, of the Records of Texas County, Oklahoma, and as modified by instrument dated May 19, 1947, executed by Isaac H. Lutes et al., recorded in Book 267, Page 537 of said Records of Texas County, Oklahoma, covering the following described land in Texas County, Oklahoma, among other lands:

> The North Half (N/2) of Section Twenty-seven (27), Township Six (6) North, Range Eighteen (18) ECM, Texas County, Oklahoma, containing 320 acres, more or less.

Under and by virtue of the provisions of the above described leases, the undersigned is granted the privilege, for the purpose of forming a unit of not to exceed Six Hundred Forty (640) acres, of consolidating and unitizing each of said leases with any other valid and subsisting oil and gas lease or leases owned by the undersigned.

NOW, THEREFORE, in pursuance of the authority granted the undersigned under and by virtue of the pro-

visions of the above described leases the undersigned hereby consolidates and unitizes the above described leases, insofar as the same cover All of Section 27-6W-18 ECM, Texas County, Oklahoma, containing 640 acres, more or less into a single unit, for the purpose of developing and operating the same for the production of natural gas and/or other minerals.

IN WITNESS WHEREOF, the undersigned has caused the above and foregoing instrument to be executed this 30 day of November, 1949.

PLAINS NATURAL GAS COMPANY
By /s/ Vernon .....
President

(Seal)

/s/ W. B. Chapman,
Assistant Secretary

APPENDIX D

Motion of Westhoma Oil Company et al. to Stay

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

OTTO G. LUTES AND FLORENCE LUTES,
Plaintiff(s),
vs.
WESTHOMA OIL COMPANY et al.,
Defendants.

No. 9410

MOTION

The Defendants, Westhoma Oil Company, Peerless Oil and Gas Company and Jake L. Hamon, respectfully show to the Court the following:

1. As shown by the complaint on file herein, this is an action to cancel an oil and gas lease and to quiet title, as to all depths, horizons and strata below sea level, underlying certain lands located in Texas County, Oklahoma. These Defendants claim to own a valid and subsisting oil and gas lease covering all such horizons below sea level, whereas the Plaintiff(s) claim that such oil and gas lease has terminated with respect to such horizons below sea level. The essential and critical question of law to be decided is the proper interpretation and construction of the oil and gas lease involved. Federal jurisdiction rests exclusively upon diversity of citizenship.

2. Said critical question of law is a question of state law, and the same has not yet been decided by the Supreme Court of the State of Oklahoma or by any other state court.

3. Plaintiff(s) rely herein upon the decision and majority opinion of the United States Court of Appeals for the 10th Circuit in *Rogers* v. *Westhoma Oil Company*, 291 F.2d 726, wherein the Court, applying Kansas law in a diversity action involving leases on lands located in the State of Kansas, upheld Plaintiff(s)' contention under an identical factual situation and an identical lease form.

4. Two actions presently are pending in the District Court of Texas County, Oklahoma, entitled *Westhoma Oil Company* v. *Rist* and *Peerless Oil and Gas Company et al.* v. *Carpenter*, respectively numbered 10596 and 10597 on the docket of said state court. The identical question of law which is involved herein and was decided by the United States Court of Appeals for the 10th Circuit in *Rogers* v. *Westhoma Oil Company*, referred to above, is decisively in issue in said actions pending in the state court.

5. These Defendants presently are preparing to file other similar actions in the District Court of Texas County,

Oklahoma. Neither of the two pending actions, nor any of those to be filed, in said state court are, or will be, removable to this Court or to any other United States Court, since only citizens and residents of the State of Oklahoma are, or will be, Defendants therein.

6. If a judgment should be rendered against these Defendants in any of said state court actions these Defendants will appeal therefrom to the Supreme Court of the State of Oklahoma. If a judgment or judgments are rendered in any of said state court actions in favor of these Defendants, it is quite probable that the party or parties against whom such judgment or judgments are rendered will appeal therefrom to the Supreme Court of the State of Oklahoma. Thus, said critical question of state law will be authoritatively decided and determined by the highest appellate court of the State of Oklahoma, and the decision of that court will be determinative of the identical and decisive question of law involved in this diversity action.

WHEREFORE, the Defendants move the Court to stay further proceedings in this action to afford an opportunity for state court determination of a decisive issue of state law, and to abstain from proceeding further with this action until after said question has been decided by the Supreme Court of the State of Oklahoma.

Cochran, Dudley, Fowler, Rucks, Baker & Jopling
By /s/ Richard W. Fowler
Richard W. Fowler
1133 First National Building
Oklahoma City 2, Oklahoma

CERTIFICATE OF SERVICE

Copies of this Motion were mailed on September 25, 1961, to Plaintiff(s)' attorneys at their respective addresses.

/s/ Richard W. Fowler
Richard W. Fowler
Attorney for Defendants

APPENDIX E

Pretrial Order

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVA J. BAXTER, Plaintiff, vs. WESTHOMA OIL COMPANY et al., Defendants.	**Case No. 9409 Consolidated with Cases Numbered 9410, 9411, 9412, 9413, 9414, 9415, 9419, 9421, 9431, 9435, 9446, 9448, 9453, 9489, 9490, 9494, 9503, 9504, 9505, 9512, 9513, 9525 and 9543.**

PRETRIAL ORDER

On the 14th day of February, 1962, this matter comes on for pretrial pursuant to notice to all parties. Plaintiffs appear by and through their attorneys Jerome E. Hemry of Hemry and Hemry and Wayne Coulson and Robert T. Cornwell of Fleeson, Gooing, Coulson & Kitch. Defendants appear by and through their attorneys, Richard W. Fowler of Cochran, Dudley, Fowler, Rucks, Baker & Jopling.

Counsel for the parties announce that they have reached an agreement concerning certain factual issues and that such agreement will be reduced to writing and filed herein.

* * *

Counsel for defendants requested that the Court reconsider its previous ruling on defendants' motion to stay, and the Court took the same under advisement.

Counsel for all parties announced that the cases were ready for trial at the Court's convenience, if defendants' Motion to Stay should be overruled.

/s/ Stephen S. Chandler

Judge Chandler